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THE RULES OF VENUE, AND THE BEGINNINGS OF THE COMMERCIAL JURISDICTION OF THE COMMON LAW COURTS.

In the latter half of the fifteenth century the rivalry which had sprung up between the common law courts on the one side, and the Council and Chancery on the other, was making for the expansion of common law doctrine in many directions. Three of these lines of expansion are especially important in relation to the commercial jurisdiction of the common law courts. In the first place the development of the action of assumpsit was giving to the common law an adequate remedy for the enforcement of contracts. In the second place, the development of the action of trover was an adequate remedy for the enforcement of title to goods. In the third place there was a movement towards some modification of the strict rules of venue which, at an earlier period, had barred the common law courts from hearing cases which turned upon acts done or transactions entered into abroad. With the development of the actions of assumpsit and trover I have dealt elsewhere.[1] Here I propose in the first place to trace the history of the modification of the rules of venue; and, in the second place, to summarize the effect of this modification on the beginnings of the commercial jurisdiction of the common law courts.

I.

Under the old common law the parties to an action were required to designate with the greatest particularity the place where the events alleged in the pleadings had happened, because the sheriff could not otherwise have summoned a jury who would know

[1] 3 Holdsworth, History of English Law, 329-349, 280, 281.

the real facts of the case.[2] But this strict rule was found to be inconvenient in cases in which the facts alleged happened partly in one county and partly in another.[3] It was this inconvenience which induced the judges to draw the distinction between transitory and local actions—"that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality, and those in which there is such a connection."[4] An instance of the former is an action on a contract, of the latter an action of trespass to land. "In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased."[5] Litigants were not slow to make use of this distinction; and in 1375[6] an action was brought on a deed which was made at Harfleur in Normandy. The plaintiff anticipated the device used at a later period by alleging in his claim that it was made at Harfleur in the county of Kent. The efficacy of this device was not decided upon, as the case went off upon another point.

But it was soon found that the parties to actions in this litigious age abused this distinction. Plaintiffs harassed defendants by purposely laying the venue in a distant place; and therefore statutes of Richard II and Henry IV's reigns required all actions to be brought in their proper counties.[7] These statutes were strictly enforced by the judges;[8] and Littleton takes it for granted that cases which involved the consideration of facts happening outside the realm could not be heard by the courts of common law.[9] But the judges were quite alive to the advantages to be got by enlarging their jurisdiction; and it is clear that they were ready to adopt any workable expedient to get jurisdiction over such cases. In 1442[10] an action was brought in the common bench on a contract made in France; and counsel, though he pleaded that no action lay

[2] 1 Holdsworth, H. E. L. 155 n. 9.

[3] For the mass of decisions, often conflicting, to which this inconvenience gave rise, see 2 Reeves, H. E. L. 409-412.

[4] [1893] A. C. 618.

[5] [1893] A. C. 618; but, as Lord Herschell said, "It was still necessary to lay every local fact with its true venue on peril of a variance if it should be brought in issue," see 1 S. L. C. 598-600.

[6] Y. B. 48 Edw. III, Hil. pl. 6.

[7] Stat. 6 Ric. II, c. 2; stat. 4 Hen. IV, c. 18.

[8] 1 S. L. C. 597, 598.

[9] Litt. § 440, "Hee that is out of the realme cannot have knowledge of the disseisin made unto him by understanding of the law, *no more than that a thing done out of the realme may bee tried within this realme by the oath of 12 men.*"

[10] Y. B. 20 Hen. VI, Pasch. pl. 21.

on such a contract in England, did not dare to risk a demurrer on this point. Newton, indeed, asserted broadly that even though the contract was made in France, an action would lie in England if the parties chose to sue there.[11] But this was rather too sweeping, as it left unsolved the difficulty as to where the venue should be laid. No doubt there was earlier authority for the proposition that if action was brought on a contract made in a county Palatine, the jury could be summoned from the neighbouring counties.[12] But in the case of an action brought in a foreign country there were no neighbouring counties.

The judges of Henry VI's and VII's reigns got over this difficulty by laying down a somewhat narrower principle which had been hinted at in the case reported in 1375. They said that if any part of the contract was to be performed in England, the action could be brought there.[13] The result was that if the contract was made in England to be performed abroad, or *vice versa,* action lay in the English courts. But if the contract was both made abroad and to be performed abroad, or if the foundation of the action was an act done wholly abroad, no action would lie.[14]

It was during the sixteenth century that this last limitation imposed by the rules of venue was got over by the adoption of the

[11]"*Mesque l' obligation se fist en France, uncore si suit en Angleterre, action peut estre maintenir sur ceo cyeins assez bien;*" and Fortescue, Y. B. 32 Hen. VI, Hil. pl. 13, seems to have held the same view.

[12]Fitzherbert's Abridgment, *Visne* pl. 50, citing 45 Edw. III, Mich.; this seems to have been the rule laid down as to the practice of the court by the protho-notaries in Y. B. 32 Hen. VI, Hil. pl. 13.

[13]Y. B. 48 Edw. III, Hil. pl. 6, Finchden says: "*Si un home soit lowe pur moy d' aler en mon message a Rome comment que le service sera fait hors de Roialme uncore pur le contrat fait en Engliterre il demandera son lower en cest court.*" Tank puts the case of a sailor hired in England: "*Il* (the hire) *sera demande en cest court per le comen ley et memy per la ley de Mariner;*" 15 Edw. IV, Mich. pl. 18; 10 Hen VII, Pasch. pl. 21; S. C. 11 Hen. VII, Hil. pl. 13. In this last case Brian thought that, though a trial of offences committed abroad may be had here—"*autrement touts ceux statuts sera voids*"—it was otherwise as to contracts made here to be performed beyond the sea; but Fineux, Vavisor and Townshend were against him. The case is abridged by Brook, Trialles pl. 154, and explained by Abbott, C. J., in Rex *v.* Burdett (1820) 4 B. & Ald. 172. Fineux clearly lays it down, in Y. B. 21 Hen. VII, Mich. pl. 32, that, "*Release oultre mer est void; mes si contract soit triable parcel deins ce Realm, et parcel oultre la mer, il sera trie icy en tout.*"

[14]Though in Y. B. 7 Hen. VII, Hil. pl. 1, Keble *arg.* said: "*Si on port accion de Debt pur son salary que il fuit retenu a servir un home in Brigg oustre la mer, et le Maistre dit que il depart de luy ou ne servit, ceo serra trie icy ou le bref est port;*" the reporter adds *Quaere de ceo. Cf.* Y. B. 21 Hen. VII, Mich. pl. 32, cited in note 13, *supra.* Dowdale's Case (1606) 6 Co. Rep. 47 b, lays down the law in accordance with Fineux's view.

fiction employed by the pleader in the Year Book of 48 Edward III.[15] The plaintiff alleged an act taking place outside the realm, and then asserted that that foreign place was situate at a place in England—"to wit in the parish of St. Mary le Bow in the Ward of Cheap." The advantages of this device were obvious. It gave the common law courts jurisdiction in transitory actions over all acts and transactions even though they happened wholly outside the kingdom; and it was clearly these advantages which led to its adoption.[16]

Neither the technical reasoning by which this device was justified, nor the date at which it prevailed are quite clear.

(i) It would appear from the cases that the line of reasoning pursued depended upon an extension of the notion of "local and transitory"[17] from the nature of the action to the nature of the defence. Littleton had said if, in an action of trespass for battery or for goods carried away, the defendant pleaded not guilty in manner and form supposed, the plaintiff would recover, though the trespass was committed in another town than that alleged in the action.[18] In Elizabeth's reign this was so, even if the trespass was committed in another county.[19] Thus, though by statute the venue must be laid in the proper county,[20] the defendant could not traverse the venue laid by the plaintiff, unless his plea was local in its nature, i. e. depended for its efficacy on the place in which the facts alleged in it happened. If his plea was transitory in its nature he could not object to the venue laid by the plaintiff. If, for instance, to an action for assault and battery in the county of X, it was pleaded that the defendant *molliter manus imposuit* to prevent the plaintiff from entering his (the defendant's) house in the county of Y, the plea was local, as the cause of justification was local; but if the plea was *son assault demesne* it was transi-

[15]Y. B. 48 Edw. III, Hil. pl. 6.

[16]Note that in Dowdale's Case (1606) 6 Co. Rep. 47 b, it is said that: "Where as well the contract as the performance of it is wholly made or to be done beyond sea, *and it so appears*, then it is not triable by our law." But by the aid of this fiction it never "so appeared." *Cf.* Robert *v.* Harnage (1704) 2 Ld. Raym. 1043, where by inadvertence of the pleader in omitting to insert the words "to wit, at London, etc.," it did so appear, and the writ abated.

[17]Above, p. 552.

[18]Litt. § 485.

[19]Co. Litt. p. 282a.

[20]Above, p. 552.

tory.[21] It is clear that most defences to actions of contract or to actions for torts to the person or to goods are transitory. Therefore in most cases the defendant could not traverse the venue laid by the plaintiff. In other words the venue so laid was untraversable, and the objection based upon venue to hearing transitory actions founded upon foreign facts disappeared.

(ii) The date at which this device was adopted by the courts of common law cannot be fixed with precision; but it was certainly during the latter half of the sixteenth century. In Henry VIII's reign it was commonly used in the courts of the City of London. Brook, who had filled the offices of common sergeant and recorder of London, after abridging the pleading in the Year Book of 48 Edward III, says that this was the common practice in London in that reign, and that in such cases the place alleged was not traversable.[22] But probably it did not became a common practice in the courts of common law till a little later. Perkins, whose "Profitable Booke" was first published in 1530, states the old law;[23] and in 1539 a bill, which was apparently intended to give the common law courts jurisdiction over contracts made abroad, was rejected by the House of Lords.[24] But in the latter half of the century the power which the legislature refused to give was secured by the adoption of this fiction. In *Dowdale's Case* (1606) its legality was finally upheld;[25] and cases of 1586 and 1589[26] in which it had been adopted were approved. The old reasoning,

[21]Peacock *v.* Peacock (1599) Cro. Eliz. 705; *cf.* Inglebatt *v.* Jones (1588) Cro. Eliz. 99; Purset *v.* Hutchings (1601) Cro. Eliz. 842; and compare Williams, Notes to Saunders Reports 248, n. 1, "It is a rule that if to a transitory action the defendant pleads any matter which is itself transitory, he is obliged to lay it at the place mentioned in the declaration. But if the justification be local, the defendant must plead it in the county where the matter rose; and at common law the cause must have been tried there, and not in the county in which the action was laid; otherwise it was error."

[22]Brooke, Abridgment, *Faites* pl. 95: *"Home covenant de servir ove D. S. in le guerre in France per indentur que port date a Rone in France, et il counta pur son wages que le fait fuit fait al Rone in Kent, et bien, et sic utebatur in London tempore H. 8 sur autiels faits, quar le lieu nest traversable."* Ibid., *Obligation* pl. 87.

[23]Perkins, Profitable Booke §§ 494, 737.

[24]1 Lords' Journals, 112: *"Billa per quam debita in transmarinis partibus per singraphas concessa habilia efficiuntur in hoc regno Angliae implacitari; quae quidem Billa jam prima vice est lecta et relicta."*

[25]6 Co. Rep. 46b.

[26]6 Co. Rep. 47b, 48a.

which based jurisdiction on some act done in England,[27] was thereby rendered unnecessary, because a plaintiff in any transitory action was now able to transport to Cheapside any act done in any part of the world.

In spite of the arguments of the civilians, who gravely proved that such a fiction was wholly contrary to the principles of the civil law regulating the employment of fictions,[28] in spite of the reluctance of the Council to accept it,[29] and in spite of the ridicule of Prynne,[30] the common lawyers held their ground. The result was that the common law courts instead of being the least open of all courts to foreign actions became the most open, provided that the cause of action was transitory.[31] The chief limitations arise either from their refusal to enforce rights wholly contrary to the principles of English law,[32] or from the physical impossibility of serving process upon a foreign defendant who is out of the jurisdiction.[33]

II.

Thus the common law had got rid of the difficulties occasioned by the old rules of venue. At the same time it had acquired in the

[27] *Cf.* Ilderton *v.* Ilderton (1793) 2 Hy. Bk. 162, where it is pointed out that there is no need to resort to this fiction if some part of the transaction happened in England.

[28] Ridley, View of the Civil and Ecclesiastical Law, 173-178; Zouch, Jurisdiction of the Admiralty Asserted, Assertion VIII; Godolphin, A View of the Admiral Jurisdiction, c. 7.

[29] Dasent XXIV (1592-3). From a letter of the Council directing arbitration in a partnership case it appears that one partner had refused arbitration, "Whereunto, as we are informed, he is induced the rather for that the contracte of partnershipp passed betwene them grewe and was made beyond the seas, which can receave no triall here at common lawe." The frequent remonstrances of the Council and the judges on account of their issue of writs of prohibition and other interferences with the Admiralty point to the same conclusion. Dasent XIV (1586-7) 317; Dasent XV (1587) 314; Dasent XXIX (1598) 367-8; Dasent XXX (1599) 3, 4; *cf.* Dasent XXVII (1597) 180,—where the merchants in a petition to the Council complain of damage caused by prohibitions issued to the Admiralty to stay execution of judgment.

[30] Prynne, Animadversions, 95, 97; 1 Holdsworth, H. E. L. 323.

[31] Phillips *v.* Eyre (1870) L. R. 6 Q. B. 28, *per* Willes, J.

[32] For a recent illustration of this principle see Kaufman *v.* Gerson (1904) 1 K. B. 591; of course, the facts relied on by the plaintiff must also give rise to a cause of action in the place where they happened. Phillips *v.* Eyre (1870) L. R. 6 Q. B. 28, 29.

[33] "Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him when present in England." Jackson *v.* Spittal (1870) L. R. 5 C. P. 549, per Brett, J.

action of assumpsit a convenient and flexible remedy for the enforcement of all kinds of contracts, and, in the action of trover, a convenient action for the enforcement of title to goods. These changes enabled it not only to claim a share in the commercial business of the country, but even to aim at securing a monopoly of that business by prohibiting the court of Admiralty from hearing such cases.

According to the theory of Coke and the common lawyers, it was only if a contract was made *super altum mare,* and was to be performed there, that the Admiralty had jurisdiction.[34] But if the Admiralty had been allowed to employ a similar fiction to that employed by the common law courts, this concession might have been used to give it the disputed jurisdiction. The courts of common law therefore denied this liberty to the Admiralty. Their own fictions were untraversable; but the allegation that a contract sued on in the Admiralty was made *super altum mare* could be defeated by a mere surmise of the litigant who applied for a Prohibition.[35] The claims made by the common law to a monopoly of this commercial business were not finally made good till after the Restoration.[36] In the sixteenth and early seventeenth centuries the agreements come to by the judges in 1575 and 1632 conceded to the Admiralty a concurrent jurisdiction.[37] But we should note that these agreements assumed that the common law courts had succeeded in making good their claim to share in this jurisdiction if the parties chose to bring their action before them.[38] And it is clear that the common law and the common lawyers were beginning to acquire some knowledge of the mechanism of foreign trade and of the law applied by the merchants to regulate their commercial relations. Thus the edition of William West's collections of precedents published in 1615, which was "newly augmented with divers Presidents touching Merchants' affaires," shows that the common lawyers were becoming acquainted with the usual forms of mercantile documents. These precedents, some of which were written in French, comprised such documents as a charter-party, a sale of a share in a ship, a bill of lading, a bill

[34] 1 Holdsworth, H. E. L. 323 n. 2, 325 n. 4.

[35] Godolphin, A View of the Admiral Jurisdiction, c. 8.

[36] 1 Holdsworth, H. E. L. 325, 326.

[37] 1 Holdsworth, H. E. L. 322, 324-5.

[38] This is expressly pointed out by Jenkins in his argument before the House of Lords in favor of a bill to ascertain the jurisdiction of the Admiralty, which proposed to enact in substance the agreement arrived at in 1623. See 1 Wynne, Life of Jenkins, LXXXV.

of exchange, an insurance policy, and a procuration of a merchant to his factor.[39] Similarly in the reports we find cases turning on such topics as jettison,[40] average,[41] insurance,[42] charter parties,[43] mercantile agents,[44] partnership,[45] bills of exchange,[46] merchant's marks,[47] bottomry,[48] freight,[49] the recaption of a captured ship,[50] an agreement to share a captured prize.[51] It is not surprising to find that Malynes recognised that it was desirable for a merchant to know something about the common law decisions.[52]

It was inevitable in these circumstances that the relation of commercial law and custom to the common law should undergo a change. In the Middle Ages, when the commercial customary law was administered in special courts for a very separate body of persons, it was something quite outside the common law.[53] It was therefore necessary to plead and prove as a special custom any particular rule which a litigant wished to rely upon in pro-

[39]West, Symboleography, Part I §§ 655-675.

[40](1609) 12 Co. Rep. 63.

[41](1590) Moore K. B. 297. This was a case in the court of Requests, but the reporter clearly thought it was a useful case for a common lawyer to know.

[42]Dowdale's Case (1606) 6 Co. Rep. 47b.

[43]Dowdale's Case (1606) 6 Co. Rep. 48a; (1611) Cro. Jac. 263-4; (1625) Palm. 397.

[44](1610) 1 Bulstr. 103; (1618) Cro. Jac. 468.

[45]Hackwell *v.* Brooks (1617) Cro. Jac. 410.

[46](1602) Cro. Jac. 7; (1613) Cro. Jac. 307; (1621) Winch, 24-25. These are the earliest cases reported, but there is reason to think that earlier cases had come before the courts. Mr. Cranch, in his essay on Promissory Notes Before and After Lord Holt, 3 Essays A. A. L. H. 76, 77, remarks that a pleading in Rastell's Entries, fol. 10 (a), which must date from before 1564, "seems to have been by the indorsee of a bill of exchange against the drawer;" and he thinks, *ibid.* 80, that a case of 1586, reported by Godbolt, 49, may refer to a case which turned upon a promissory note.

[47](1618) Cro. Jac. 471, *per* Doddridge, J.

[48](1628) Noy. 95; Hob. 11, 12.

[49](1612) 1 Brownl. & G. 22.

[50](1611) 2 Brownl. & G. 11.

[51](1590) 2 Leon. 182.

[52]Lex Mercatoria, Part I, 76; after giving two decisions on bills obligatory, he says: "These observations at the common law, and such like book cases as I have put down, I hold to be necessary for merchants to know, albeit we handle the law merchant in this treatise, and not matters of the common law."

[53]1 Holdsworth, H. E. L. 312; 2 *ibid.* 259. The earlier mediaeval point of view is illustrated by the following dialogue in Y. B. 21-22 Edw. I (R. S.) 456-8: "Metingham, C. J., He who demands this debt is a merchant; and therefore if he can give slight proof to support his tally we will incline to that side.—Gosefeld, Alas! Sir, we are here at common law; wherefore we are advised that he shall not be received in this Court, inasmuch as he can have his recovery elsewhere by Law Merchant."

ceedings before a common law court.[54] But when the common law courts began to open their doors to commercial cases, it became clear that they must take notice of this customary commercial law and accept it as part of the common law. A case reported by Brook shows that they had adopted this new position at least as early as 1543.[55] In that case a general custom of the merchants had been specially pleaded; and it was agreed that the pleading was bad, because a custom prevailing *inter mercatores per totam Angliam* was common law, and could therefore no more be pleaded than any other general rule of the common law.[56] It followed, to use Coke's words, that, "the Law Merchant is part of the laws of this Realm."[57]

But in spite of the recognition of the fact that the law merchant was part of the common law, the courts, at the beginning of the seventeenth century, found it much more convenient to allow the customs of the merchants to be pleaded specially.[58] This was due to three closely allied causes. In the first place the lawyers, being very ignorant as to the exact scope of many of these customs, it was convenient to have them set out in the pleadings. In the second place, though mercantile custom was recognised as being part of the common law, it as yet applied only as between merchants; and it was necessary to state in the pleadings that the parties were merchants.[59] In the third place, the forms of action

[54]Placitorum Abbreviatio, 321, gives a good illustration of the way in which plaintiff and defendant pleaded their different versions of the commercial custom affecting their case.

[55]Brooke, Abridgment, *Customs* pl. 59,—"*Information in Scaccario vers marchant pur lader vine in estrange niefe. Le defendant plede lycence par le roy fait a J. S. de ceo faire, quel J. S. aver graunt son auctoritie inde al defendant, et quod habetur consuetudo inter mercatores per totam Angliam que un poet assigner tyel lycence ouster a un auter et que l' assigne enioyera ceo etc. que fuit demurre in ley, et fuit agre pur ley, que home ne puit prescriber custome per totam Angliam, que si soyt per totam Angliam, ceo est un commen ley et menye un custome, contra si le custome ust estre plede d' estre in tyel citye ou countye.*"

[56]*Cf.* Y. B. 2 Hen. IV. Pasch. pl. 5, cited in 3 Holdsworth, H. E. L. 331 n. 4.

[57]Co. Litt. p. 182a.

[58]On this matter generally in its application to negotiable instruments see 2 Street, Foundations of Legal Liability 347-350.

[59]In Barnaby *v.* Rigalt (1633) Cro. Car. 301-2, error was assigned because the plaintiff was not shown to have been a merchant at the time of the delivery of the bill of exchange, which was the subject of the action; but judgment was affirmed because he was named a merchant in the declaration. *Cf.* Edgar *v.* Chut (1663) Keb. 592, where, though it was said that the drawer or payee of a bill of exchange need not be a merchant, it was assumed that the remitter and drawee must be. As a matter of fact, bills of exchange were before this date ordinarily used by Englishmen travelling abroad; thus, in the Memoirs of Sir John Reresby (Ed. Cartwright 1875) 26, Sir John states that in 1654 he stayed no longer in Paris "than to get my clothes and to receive my bills of exchange."

at common law could not easily be applied to enforce many of the rights recognised by the merchants (e. g. the rights of the different parties to a bill of exchange) except by stating the custom in some detail, and giving an action on the case based upon the custom thus stated. But towards the end of the seventeenth century the courts were able to revert to the position taken up by Brook and Coke. Their knowledge of mercantile custom was growing greater. It was decided that this custom would apply to any mercantile transaction irrespective of the status of the parties.[60] The various actions on the case based on mercantile custom were giving rise to recognised legal rights. It was no longer necessary to set out the custom in order to justify or explain those legal rights, because they were regarded as depending, like any other rights, on the common law.[61]

But though the law merchant had thus become part of the common law, and applicable like any other part of the common law to all Englishmen, it was still a body of customary law. From the earliest period of English legal history the common law judges had exercised the power of refusing to recognise the validity of customs which they considered to be unreasonable. They naturally exercised this power in relation to these commercial customs; and its exercise fixed the limits within and the conditions under which they were allowed to become a part of the common law.[62] It was a familiar task upon which the common law judges were engaged when they thus set themselves to construct from a basis of commercial custom new branches of the common law. These same judges were in a similar manner constructing our modern law as to copyhold tenure;[63] and their forefathers in the twelfth and thirteenth century had thus laid the foundation of the common law itself.[64]

We naturally ask how these common law judges set about their work of incorporating these commercial customs into the common

[60]"The law of Merchants is the law of the land, and the custom is good enough generally for any man without naming him merchant." Woodward *v.* Rowe (1666) 2 Keb. 132. *Cf.* Witherby *v.* Sarsfield (1690) 1 Show. 125; Bromwich *v.* Lloyd (1699) 2 Lutw. 1525.

[61]Williams *v.* Williams (1694) Carth. 269, 270.

[62]*Cf.* Smith, Mercantile Law (11th ed.) Introd. LXXVIII-LXXX; as it is there said, these customs "were subjected to certain tests which were not always satisfied—e. g. the test whether they were reasonable, certain, and not arbitrary." Thus, "rejecting some * * * affirming others * * * the king's courts * * * did much to put an end to diversity of usages."

[63]3 Holdsworth, H. E. L. 174-180.

[64]2 Holdsworth, H. E. L. 117, 118.

law. It would appear from the cases that they acted chiefly upon the evidence produced before them as to contents of the commercial custom applicable to the case in hand.[65] Though, as we have said, they did not hesitate to overrule such customs if they appeared to them to be unreasonable,[66] they always attached the greatest importance to them. In fact they were obliged to do so, as it is difficult to see from what other source they could have derived the rules requisite to decide these cases. Sometimes also they received evidence as to the rules which were applied by the civilians. But they did not treat those rules with quite the same respect as that which they paid to commercial custom. A rule put forward as a commercial custom was more likely to find favor than a rule put forward as a rule of the civil law.[67] Some few lawyers indeed recognised that the legal principles underlying these commercial customs could be learned only from the writings of the foreign civilians. Prynne, at the close of his chapter on the court of Admiralty, cites a long list of writers whose works might be profitably consulted.[68] But these works were not easy for a common lawyer to read; and so they remainded unread. It was not till the common law obtained in Lord Mansfield a judge who was a master of this learning that the rules deducible from the

[65]"The custom of the merchants is part of the common law of this kingdom, of which the judges ought to take notice: and if any doubt arise to them about their custom, they may send for the merchants to know their custom, as they may send for the civilians to know their law," Van Heath *v.* Turner (1621) Winch, 24. In Pickering *v.* Barkley (1649) Style, 132, which turned upon the question whether capture by pirates was a peril of the sea, a certificate of the merchants that this danger was considered by them to be a peril of the sea was read, and "the court desired to have Gravely, the Master of the Trinity House, and other sufficient merchants to be brought into the court to satisfy the court *viva voce.*" *Cf.* Peirson *v.* Pounteys (1609) Yelv. 136,—"The judges ought to take notice of that which is used amongst merchants, for the maintenance of traffic;" Scarreborrow *v.* Lyrius (1628) Noy. 95,—a case turning on the custom that the master can under certain circumstances borrow money on bottomry.

[66]As in Van Heath *v.* Turner (1621) Winch, 24.

[67]Somers and Buckley's Case (1590) 2 Leon. 182,—the Admiralty had refused to allow a plea that an agreement had been entered into to share a captured prize, and the Common Pleas permitted the Admiralty to proceed if it would allow the plea. Bright *v.* Cowper (1612) 1 Brownl. & G. 22,—A merchant, contrary to the rule of the civil law, held not liable to pay freight on goods brought safe to port, because part had been captured by pirates. Bridgeman's Case, Hob. 11, 12,—The civil law of the Admiralty expressly followed as to money borrowed by the master on bottomry. In 1712, in Assievedo *v.* Cambridge, 10 Mod. 771, civilians argued before the King's Bench as to the effect upon the liability of an insurer of a capture followed by a recapture before the ship had been carried *infra praesidia.*

[68]Prynne, Animadversions, 133. Besides the English writers of the time he refers to Straccha, Shardius, Johannes Nider, Edicta regnum Franciae, Renanus Choppinus, Julius Ferretus, Henricus Ranzovius.

many various commercial customs which had come before the courts were formed into a coherent system, and completely incorporated with the common law.[69] Even then the distinctive character of the rules of commercial law, and their adaptability to the ever changing needs of new commercial conditions, have caused them to preserve many characteristic features unknown in other departments of the common law.[70]

It is clear however that as early as the first half of the seventeenth century the process of incorporating the rules of commercial law into the common law had been begun. These rules had ceased to be quite outside the common law. They were recognised as a part of the common law, though as yet they were a separate part of the common law. In many cases it was necessary that their existence should be proved to and their reasonableness approved by the judges of the common law courts before they were enforced as law; and owing partly to the fact that the common law was very bare of principles applicable to the commercial problems of the day, and partly to the fact that their procedure was ill adapted to the trial of many of these cases,[71] litigants, when possible, avoided the common law courts. But the common law judges were not discouraged by these disadvantages of which, indeed, most of them were hardly conscious. They decided the cases which came before them to the best of their ability; and, owing to the political events of the seventeenth century, which gave them the victory over rival jurisdictions, their decisions have an historical importance which they would not otherwise possess. In them we can see the beginnings of a continuous native development which has shaped the commercial and maritime law used by all English-speaking races at the present day.

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[69] 1 Holdsworth, H. E. L. 336, 337; *cf.* Park, Marine Ins. (1st. ed.) XLII-XLIV; Smith, Mercantile Law, Introd. LXXXII.

[70] Perhaps the most marked is the efficacy of commercial custom to make new law, as illustrated by the cases which show that a general custom of the merchants to treat certain instruments as negotiable will make them negotiable, 1 Holdsworth, H. E. L. 337 n. 1. This recognition by the courts of the power of the commercial custom to do now what it did in the past, is the best security that commercial law will continue to be living law in touch with the real world of commerce. We may remember that Bagehot once said about banking, in his Economic Studies, 18, that it "goes on growing, multiplying, and changing, as the English people itself goes on growing, multiplying, and changing. The facts of it are one thing to-day and another to-morrow;" and this is true of very many other branches of commerce.

[71] 1 Holdsworth, H. E. L. 323-4.